Supreme Court, U.S.
FILED
JAN 23 1997
CLERK

No. 96-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA PARKER, Individually, and as the Next Friend of DANA M. PARKER, and DANA M. PARKER,

Petitioners,

vs.

RODNEY BOYER, DAN DELL, SIMON RISK, and MULTI-MEDIA KSDK, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARY ANN L. WYMORE*
GERALD R. ORTBALS
JOHN E. PETITE
GREENSFELDER, HEMKER & GALE, P.C.
2000 Equitable Building
10 South Broadway
St. Louis, Missouri 63102-1774
(314) 241-9090

Counsel for Respondent Multimedia KSDK, Inc.

*Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

THE QUESTIONS PRESENTED FOR REVIEW

I

Did the Court of Appeals correctly determine that Respondent Police Officers were entitled to qualified immunity because at the time of the alleged constitutional violation it was not clearly established that the Fourth Amendment prohibits law enforcement officers from allowing members of the news media to observe and film a search on private property, where at the time of the search most, if not all, courts had refused to hold such activity to be unconstitutional?

II

Did the Court of Appeals correctly determine that Respondent Police Officers were entitled to qualified immunity without first determining whether the constitutional right Petitioners sought to vindicate in fact exists, when deciding this case on that basis avoided needlessly reaching and resolving a complex constitutional question?

III

Did the Court of Appeals correctly determine that KSDK was not a state actor for purposes of 42 U.S.C. § 1983, when, acting on its own initiative and solely for newsgathering purposes, KSDK's news crew entered a private residence to observe and film a search by local law enforcement officials therein, without participating in, aiding or orchestrating the search, and without prior authorization, direct assistance or express permission from the law enforcement officials conducting the search?

RESPONDENT'S OBJECTIONS TO PETITIONERS' QUESTIONS PRESENTED FOR REVIEW

Respondent Multimedia KSDK, Inc. ("KSDK") objects to Petitioners' Questions Presented for Review, in that Questions I and III contain misstatements of fact that are directly contradicted by the findings of undisputed fact in the courts below. Specifically, KSDK objects to the Petitioners' statement in Question I that Respondents Boyer, Dell and Risk "assisted" KSDK in entering the Parker residence. Similarly, KSDK objects to Petitioners' statement in Question III that KSDK "entered Petitioners' home with direct assistance and permission of Respondent Police Officers ...." Both of these statements are contradicted by the findings of undisputed facts in the courts below. *See Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir. 1996)("It is undisputed that KSDK acted independently of the police in deciding to enter the house and videotape the events there and that neither KSDK nor the police assisted the other in the performance of their separate and respective tasks."). Accordingly, Respondent Multimedia, KSDK, Inc., while denying that this case presents any issues that warrant this Court's review, respectfully submits the Questions Presented for Review as set forth on the preceding page.

TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED FOR REVIEW	i
OBJECTIONS TO PETITIONERS' QUESTONS PRESENTED FOR REVIEW	ii
TABLE OF AUTHORITIES	vi
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE	1
STATEMENT OF THE CASE	1
1. The Undisputed Facts	1
2. The District Court Action	4
3. The Decision of the United States Court of Appeals for the Eighth Circuit	5
REASONS FOR DENYING THE WRIT	7
I. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE AT THE TIME OF THE ALLEGED CONSTITUTIONAL VIOLATION IT WAS NOT CLEARLY ESTABLISHED THAT THE FOURTH AMENDMENT PROHIBITS LAW ENFORCEMENT OFFICERS FROM ALLOWING MEMBERS OF THE NEWS MEDIA TO OBSERVE AND FILM A SEARCH ON PRIVATE PROPERTY, WHERE AT THE TIME OF THE SEARCH MOST, IF NOT ALL, COURTS HAD REFUSED TO HOLD SUCH ACTIVITY TO BE UNCONSTITUTIONAL?	7

II. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY WITHOUT FIRST DETERMINING WHETHER THE CONSTITUTIONAL RIGHT PETITIONERS SOUGHT TO VINDICATE IN FACT EXISTS, WHEN DECIDING THIS CASE ON THAT BASIS AVOIDED NEEDLESSLY REACHING AND RESOLVING A COMPLEX CONSTITUTIONAL QUESTION? 12

III. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT KSDK WAS NOT A STATE ACTOR FOR PURPOSES OF 42 U.S.C. § 1983, WHEN, ACTING ON ITS OWN INITIATIVE AND SOLELY FOR NEWSGATHERING PURPOSES, KSDK'S NEWS CREW ENTERED A PRIVATE RESIDENCE TO OBSERVE AND FILM A SEARCH BY LOCAL LAW ENFORCEMENT OFFICIALS THEREIN, WITHOUT PARTICIPATING IN, AIDING OR ORCHESTRATING THE SEARCH, AND WITHOUT PRIOR AUTHORIZATION, DIRECT ASSISTANCE OR EXPRESS PERMISSION FROM THE LAW ENFORCEMENT OFFICIALS CONDUCTING THE SEARCH? 13

A. There Is No Conflict Among the Circuit Courts of Appeals, Or Between The Decision Below and Those of This Court, to Support Petitioners' Petition. 14

B. The District Court Properly Granted Summary Judgment in KSDK's Favor as to Petitioners' Claims under 42 U.S.C. § 1983, And the Eighth Circuit Correctly Affirmed That Ruling, Because KSDK's Conduct at Issue in this Case Does Not Constitute State Action under *Lugar v. Edmondson Oil Co.* 16

1. KSDK Was Not Exercising a Right or Privilege Created by the State When It Entered the Parker Residence and Filmed the Search. 18

2. KSDK Cannot Fairly Be Said To Be A State Actor. 21

a. The Undisputed Facts Do No Support A Finding of State Action Under the Joint Participation Test. 21

b. The Undisputed Facts Do No Support A Finding of State Action Under Either the Symbiotic Relationship Theory Or the Nexus Theory. 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases:

United States Supreme Court

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 22,25

Ashwander v. TVA, 297 U.S. 288 (1936) 12

Blum v. Yaretsky, 457 U.S. 991 (1982) 26

Burdeau v. McDowell, 256 U.S. 465 (1921) 19

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 25

Collins v. Harker Heights, ___ U.S. ___, 112 S.Ct. 1061 (1992) 12

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) 21

Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) 26

Florida Star v. B.J.F., 491 U.S. 524 (1989) 28

Graver Tank Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 16

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 8

Katz v. United States, 389 U.S. 347 (1967) 11,12

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) ..... *passim*

Mitchell v. Forsyth, 472 U.S. 511 (1985) 8

Polk County v. Dodson, 454 U.S.312 (1981) 23

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 26

Siegert v. Gilley, 500 U.S. 226 (1991) 13

Soldal v. Cook County, 506 U.S. 56 (1992) 12

United States v. Johnston, 268 U.S. 220 (1925) 16

United States v. Lorenzetti, 467 U.S. 167 (1984) 14

United States v. Mendoza, 464 U.S. 154 (1984) 9,12,14,21

United States v. Price, 383 U.S. 787 (1966) 21,22

United States v. National Treasury Employers Union, ____ U.S. ____, 115 S.Ct. 1003 (1995) 12

Federal Courts of Appeals and District Courts

Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994) 13

Allen v. Combined Communications Corp., 7 Med.L.Rptr. 2417 (D. Colo. 1981) 27

Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, ___U.S.___, 115 S.Ct. 1689, (1995) ..... *passim*

Berger v. CNN, Inc., 24 Med.L.Rptr. 1757 (D. Mont. 1996) 15

Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992) 10,14,19

Bills v. Aseltine, 52 F.3d 596 (6th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 179 (1995) 9,11,14,19

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) 9,10

Jones v. Taibbi, 508 F.Supp. 1069 (D. Mass.), *cert. denied*, 454 U.S. 1085 (1981) 15,23

Jordan v. Fox Rothschild O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) 27

Lucas v. Wisconsin Electric Power Co., 466 F.2d 638 (7th Cir. *en banc* 1972), *cert. denied*, 409 U.S. 1114 (1973) 25

Mershon v. Beasley, 994 F.2d 449 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1055 (1994) 22,24

Mullins v. Bookman, 23 Med.L.Rptr. 2374 (N.D. Ga. 1995) 15,23

Murray v. Wal-Mart, Inc., 874 F.2d 555 (8th Cir. 1989) 22

Parker v. Clarke, 905 F.Supp. 638 (E.D. Mo. 1995), *amended* at 910 F.Supp. 460 (E.D. Mo. 1995), *affirmed in part and reversed in part, sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996) ..... *passim*

Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262 (10th Cir. 1989) 17

Price v. Baker, 693 F.2d 952 (10th Cir. 1982) 23

Taylor v. Peabody Coal Co., 892 F.2d 503, 508 (7th Cir. 1990) 12,13

United States v. McKeever, 906 F.2d 129 (5th Cir. 1990), *cert. denied*, 498 U.S. 1070 (1991) 11

United States v. Sanchez, 509 F.2d 886 (6th Cir. 1975) 14,19

Vector Research, Inc. v. Howard & Howard Attorneys, P.C., 76 F.3d 692 (6th Cir. 1996) 27

Wyatt v. Cole, 994 F.2d 1113 (5th Cir.), *cert. denied*, 510 U.S. 977 (1993) 27

Zerilli v. Evening News Ass'n., 628 F.2d 217 (D.C. Cir. 1980) 17

State Courts

Boling Concrete Constr. Co. v. Townsend, 686 S.W.2d 842 (Mo. Ct. App. 1985) 28

Prahl v. Brosamle, 98 Wis.2d 130, 295 N.W.2d 768 (Ct. App. 1980) 15,23

Constitutional Provisions

United States Constitution, Amendment I 26

United States Constitution, Amendment IV ..... *passim*

Statutes

United States Code, tit. 42, § 1983 ..... *passim*

United States Code, tit. 18, § 3105 9

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Amendment I to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

1. The Undisputed Facts.

Petitioners' Statement of the Case contains misstatements of fact. Such misstatements have been noted where they are of particular significance to this Court's consideration of the Petition.

Respondent Multimedia KSDK, Inc. ("KSDK") is a television station operating in St. Louis, Missouri, and a member of the professional news media. (Joint Appendix ("App.") 284.) KSDK is the proprietor of a local news program known as "NewsChannel 5," which airs in and around the City of St. Louis. (App. 284.)

In or about February, 1994, a KSDK reporter, Randy Jackson, was developing a story regarding the St. Louis Police Department's ("SLPD") weapons suppression program.[1] To report this story accurately, Mr. Jackson sought and obtained permission from the SLPD for a KSDK news crew to ride along[2] with SLPD's Mobile Reserve Unit

---

[1] Unless otherwise noted by citation to the record below, these and the following facts are taken from the District Court's findings of undisputed fact. *See Parker v. Clarke*, 905 F.Supp. 638, 640-41 (E.D. Mo. 1995)

[2] A ride along is not an uncommon, but a routine method of newsgathering in which reporters ride along with police officers as they carry out police business. Indeed, the SLPD has an informal custom and practice of allowing members of the professional news media such as KSDK to engage in ride alongs. Accordingly, SLPD approved

(Footnote 2 continued on next page)

("MRU"), the unit responsible for executing the weapons suppression program. On the morning of February 9, 1994, the SLPD gave Mr. Jackson and a KSDK camera operator permission to ride along with MRU officers during that evening's shift.[3]

At approximately 9:00 p.m., the MRU officers with whom the KSDK news crew was riding decided to execute a search warrant for cocaine, heroin, weapons, currency and drug transaction records at the house Plaintiffs-Petitioners Sandra C. Parker ("S. Parker") and Dana M. Parker ("D. Parker") (collectively "the Parkers" or "Petitioners") occupy along with numerous relatives.[4] The KSDK news crew was not

---

(Footnote 2 continued)

Mr. Jackson's request and permitted KSDK to ride along with MRU officers on the night of February 9, 1994. Petitioners attempt to transmute the SLPD's granting permission for a generic ride along into an affirmative agreement between the SLPD and KSDK that the news crew would enter the Parker residence to observe and film the search. The District Court, however, rejected the Parkers' invitation to engage in such a broad leap in logic and expressly found that there was no "affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which plaintiffs now challenge." 908 F.Supp. at 642.

[3] The permission sought and obtained extended only to riding along in the officers' squad car. At no time did KSDK discuss with police officers the issue of what the KSDK news crew would do during the ride along or whether they would enter any residence the officers might search. 905 F.Supp. at 641. In arguing to the contrary, Petitioners go so far as to claim that "[p]ermitting news media to be present during searches is consistent with City's police department policy and practice, even when the home's residents have not consented to the broadcast of their images." Petition, p. 5. The District Court, however, in sharp contrast to Petitioners' assertions, found that "[a]lthough the deposition testimony of various defendants indicates that 'media ride-alongs' with SLPD officers are a fairly common occurrence, there is no evidence of any incidents of media entry into a home, without the occupant's consent, concurrent with the execution of [a] search warrant, other than the two instances on the night here at issue." 905 F.Supp at 644.

[4] Petitioners claim that "[n]o arrests were ever made nor any illegal weapons or drugs discovered as a result of this search." *See* Petition, p. 4. This is not true. As the District Court held below: "Two weapons and several substances believed to be cocaine, in both rock and powder form, were seized during the search. Travis Martin [the target of the search, a relative of the Parkers and at one point a resident of the house] was arrested for controlled substance and firearms offenses, but no charges ultimately were filed against Travis Martin or anyone else as a result of the execution of the search warrant." 908 F.Supp. at 641.

aware until they arrived at the house that a search warrant was to be executed.[5] When the MRU officers began to execute the search warrant, the KSDK news crew, acting on its own initiative, decided to cover this breaking news and entered the premises and videotaped the search (App. 273), which later was broadcast on KSDK's news program.

The police did not specifically invite the KSDK news crew to enter the residence and did not even realize initially that the news crew had followed police inside. (App. 176-77.) Neither the police nor any occupant of the house, including the Petitioners, gave any indication that they objected to KSDK's entry onto the premises. To the contrary, the occupants, despite recognizing the KSDK news crew as members of the local media, appeared to be agreeable to their presence. (App. 225, 230, 233-34, 241, 274, 352.)

Once inside the house, the KSDK camera operator filmed portions of the police search while Mr. Jackson observed and gathered information for his news report. The SLPD never directed or encouraged the KSDK news crew to report or film the search, where to go in the house or what aspects of the search to report or film. Similarly, the KSDK news crew did not encourage or solicit the execution of the search, participate in any way in the search, orchestrate police activity during the search, or aid or assist the SLPD in conducting the search.

Although KSDK did not obtain the Petitioners' or any other occupant's *express* consent to be filmed, at no time did any of the occupants, including the Petitioners, act in such a way that would suggest they objected to the presence of the KSDK news crew. To the contrary, the occupants of the home willingly conversed with the KSDK news crew as the crew and the occupants waited in the living

---

[5] Petitioners' statement of the case baldly asserts that MRU officer Boyer told Mr. Jackson and Mr. McCollum when they first met for the ride along that the officers would be executing a search warrant that night. Petitioners also assert in contravention of the record below that Officer Risk knew at that evening's roll call that the KSDK news crew would be accompanying the Police Officers during the search. (*See* Petition, p. 3). However, the District Court's findings of undisputed fact establish that KSDK first learned of the search at the Parker residence at approximately 9:00 p.m., as the MRU officers began to execute the search warrant at that location. *See* 908 F.Supp. at 641.

room while the SLPD searched the house. (App. 309, 319.) Neither Petitioner, nor any of the other occupants, asked the KSDK news crew to leave the house, indicated in any way that they did not want to be filmed, or asked the KSDK news crew not to broadcast film of the search. (App. 285, 299, 315, 321, 326, 330, 337, 341.)

Following the search, KSDK broadcast Mr. Jackson's story regarding the weapons suppression program, including several seconds of film recorded during the search. At no time either before or after this initial broadcast did Petitioners or anyone acting on their behalf ever ask KSDK not to air the videotape filmed during the search.

2. The District Court Action.

In their District Court action, Petitioners alleged that KSDK and numerous City defendants violated their federal civil rights under 42 U.S.C. § 1983 and invaded their state law privacy rights as a result of KSDK's coverage of the search. The District Court granted summary judgment in favor of KSDK on Petitioners' § 1983 claim, finding that, based on the undisputed facts, KSDK was not a state actor under *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). *Parker v. Clarke*, 905 F.Supp. 638, 641-43 (E.D. Mo. 1995).[6] In holding that KSDK was not a state actor, the District Court first determined that

> KSDK's allegedly unconstitutional conduct — entry into plaintiffs' home and the recording and broadcasting of objects and events inside the home — was not, in the words of *Lugar*, "caused by the exercise of some right or privilege created by the State." At most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant. (*Parker*, 905 F.Supp. at 642.)

The District Court then determined that Petitioners failed to satisfy the second *Lugar* prong, which requires them to establish that KSDK "may fairly be said to be a state actor", because Petitioners could not establish that KSDK was a "willful participant in joint activity with the

---

[6] The District Court simultaneously denied the Parkers' motion for summary judgment against KSDK as to liability on the same constitutional claim.

State or its agents." 908 F.Supp. at 642-43. The District Court based this conclusion on its finding that:

> [t]he undisputed evidence indicates that the KSDK personnel had been allowed to "ride along" with the [MRU] officers during their shift, and that when, in the course of that shift, a determination was made to execute this particular search warrant, the KSDK personnel came along. The passivity of this circumstance demonstrates the absence of any affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which Plaintiffs now challenge. (*Parker*, 905 F.Supp. at 642.)

Because Petitioners thus could not satisfy both prongs of the *Lugar* test, the District Court held that KSDK did not act under color of state law and granted summary judgment in favor of KSDK on Petitioners' Fourth Amendment based § 1983 claim.[7]

With respect to Petitioners' claims against the City, the SLPD and the individual police officers, the District Court, following the reasoning of the Second Circuit in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1689 (1985), rejected the qualified immunity defense of SLPD officers Boyer, Dell and Risk and granted summary judgment against only those defendants on Petitioners' § 1983 claim. 905 F.Supp. at 643-44. The District Court determined that, in "allow[ing]" the media to enter the Parker residence and tape the search, officers Boyer, Dell and Risk had not only violated clearly established Fourth Amendment principles, but also, as a matter of law, were liable on Petitioners' Fourth Amendment based § 1983 claim. *Id.*

3. The Decision of the United States Court of Appeals for the Eighth Circuit.

Petitioners appealed the District Court's state action decision in favor of KSDK, and Respondents Boyer, Dell and Risk appealed the

---

[7] The District Court dismissed without prejudice Petitioners' pendent state law claims. Petitioners recently refiled those claims in Missouri state court against KSDK, Mr. Jackson and the KSDK camera operator Jeff McCollum, where such claims remain pending.

qualified immunity and Fourth Amendment decision, to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the District Court's order granting summary judgment in favor of KSDK and reversed the summary judgment against the police officers. *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996). In affirming the lower court's determination that KSDK was not a state actor, the Eighth Circuit concluded that Petitioners had not satisfied the first prong [8] of the *Lugar* test because

> [i]t is undisputed that KSDK acted independently of the police in deciding to enter the house and videotape the events there and that neither KSDK nor the police assisted the other in the performance of their respective tasks. The KSDK personnel did not execute the search warrant and they entered the house after the police did. The television station was there for reasons of its own and was engaged in a mission entirely distinct from the one that brought the police to the house. Seizing an opportunity to trespass is not the same as invoking a right or privilege. We agree with the district court that "at most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of the search warrant," 905 F.Supp at 642, and that KSDK was not exercising a right or privilege created by the state when it decided to enter the Parkers' home to record the events taking place there. KSDK's entry into the Parkers' house and videotaping the events that occurred there was therefore not an act committed under color of state law." *Id.* (*citing Lugar*, 457 U.S. at 936).

In addition, the Court of Appeals, without reaching Petitioners' underlying Fourth Amendment claim, reversed the District Court's grant of summary judgment against officers Boyer, Dell and Risk, holding that they were entitled to qualified immunity because the specific rule announced in *Ayeni*, upon which the District Court based its decision, post-dated the allegedly unconstitutional search and thus could not be the basis for a denial of qualified immunity. *Id.* at 447.

---

[8] The Court of Appeals did not review the District Court's application of *Lugar*'s second prong to the undisputed facts of this case.

Petitioners now request this Court to review the decisions of the Court of Appeals (1) reversing the District Court's grant of summary judgment against Officers Boyer, Dell and Risk, on the basis that the officers are entitled to qualified immunity, and (2) affirming the District Court's grant of summary judgment against Petitioners on their § 1983 claim against KSDK on the basis that KSDK was not acting "under color of law" when it entered Petitioners' residence and filmed the SLPD search therein.

REASONS FOR DENYING THE WRIT

This case does not present issues that warrant review by this Court because the Court of Appeals did not resolve them in direct conflict with the holdings of other federal courts of appeals or those of this Court. Even if the decision of the Court of Appeals can be stretched to create such a conflict, the issues presented herein should, at the very most, be allowed to mature and thereby become ripe for this Court's review by first percolating among the courts of appeals. Finally, and equally important, the Petition should be denied because the Court of Appeals correctly resolved those issues against Petitioners and properly determined that Respondents were entitled to summary judgment on Petitioners' § 1983 claim.

I. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE AT THE TIME OF THE ALLEGED CONSTITUTIONAL VIOLATION IT WAS NOT CLEARLY ESTABLISHED THAT THE FOURTH AMENDMENT PROHIBITS LAW ENFORCEMENT OFFICERS FROM ALLOWING MEMBERS OF THE NEWS MEDIA TO OBSERVE AND FILM A SEARCH ON PRIVATE PROPERTY, WHERE AT THE TIME OF THE SEARCH MOST, IF NOT ALL, COURTS HAD REFUSED TO HOLD SUCH ACTIVITY TO BE UNCONSTITUTIONAL?

The Eighth Circuit Court of Appeals correctly determined that Respondents Risk, Boyer and Dell are entitled to qualified immunity with respect to Petitioners' claims based on the state of the law at the time of the search in question. Petitioners now assert that the Eighth

Circuit decision below conflicts with the Second Circuit Court of Appeals' decision in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1689 (1995), thus justifying review by this Court. This is not so for two reasons. First, *Ayeni* was decided after the search at issue herein and thus "cannot weigh in the balance against a finding of qualified immunity," as the Court of Appeals properly held below. *Parker*, 93 F.3d at 447. Thus, reliance on *Ayeni* would have violated the well-settled principle that "[i]n assessing claims of qualified immunity, we are of course required to examine the state of the relevant law at the time the officials committed the acts of which the plaintiffs complain." *Id.* at 447, *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). At the time of the search of Petitioners' residence, "most courts had rejected the argument that the United States Constitution forbids the media to encroach on a person's property while the police search it." *See* 93 F.3d at 447, and cases cited therein.[9]

Second, the *Ayeni* and *Parker* decisions were based on such strikingly dissimilar facts that it cannot be said that the precise holdings of these decisions conflict. In *Ayeni*, the court confronted the issue of whether law enforcement officials are entitled to qualified immunity when they expressly invite members of the private news media into a private residence to film the execution of a search warrant therein and orchestrate the actions of the media during the search. Conversely, in the instant case, neither the City Respondents nor any other City official affirmatively or expressly invited KSDK into the residence. Nor did the City Respondents or any other City official orchestrate any of the media's actions inside the residence.

The two cases are further distinguishable in that the Ayenis, unlike Petitioners herein, expressly, repeatedly and vigorously objected to the media's filming them during the search. Conversely, despite recognizing the KSDK crew as members of the local media, neither Petitioner — nor any other occupant of the house — voiced or in any

---

[9] It is noteworthy that the court in *Ayeni* inexplicably did not discuss, let alone distinguish, the contrary holdings of other courts properly considered by the Eighth Circuit below.

other way expressed any objection to KSDK's presence in the residence or the filming of the search.

Additionally, *Ayeni* involved federal law enforcement officials subject to the constraints of 18 U.S.C. § 3105, the federal warrant statute to which the *Ayeni* court looked for guidance, whereas the instant case involves local law enforcement officials whose conduct is not circumscribed by that federal statute. In light of these factual and analytical distinctions, it cannot be said that the decision of the Court of Appeals below directly conflicts with the qualified immunity decision of the Second Circuit in *Ayeni*.

Even if the many distinctions between the decision below and *Ayeni* are discounted, review by this Court is unwarranted at this time because any real or imagined conflict as to the state of the law in 1992 or 1994 will, in short order, resolve itself without this Court's intervention. Moreover, any tension between the decisions arises in the context of an immature and developing area of the law that has yet to "percolate" in the circuit courts of appeals. Indeed, the Court of Appeals below characterized *Ayeni* as "indicat[ing] at most only the beginnings of a trend in the law." In *United States v. Mendoza*, 464 U.S. 154 (1984), this Court reaffirmed its longstanding principle that several appellate courts should explore a particular issue before *certiorari* is granted. *Id.* at 160. Applying the *Mendoza* rule to this case commands the conclusion that the Petition should be denied.

Petitioners seek to avoid the operation of the *Mendoza* rule by arguing that two other courts of appeals, the Fourth Circuit in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), and the Sixth Circuit in *Bills v. Aseltine*, 52 F.3d 596 (6th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 179 (1995) ("*Bills II*"), likewise have confronted this issue and resolved it in a manner that conflicts with the decision below. Close inspection of these decisions, however, demonstrates that, notwithstanding Petitioners' argument to the contrary, they do not conflict with the decision of the Court of Appeals below.

In *Buonocore*, the Fourth Circuit addressed issues factually and legally distinguishable from those presented by the instant case and therefore cannot support Petitioners' attempt to multiply any purported split of authority. The court there addressed the issue of

whether federal law enforcement officials can be liable under the Fourth Amendment when they invite a private corporate security officer to participate in a search, not to assist the officials in their search, but to engage in an independent search for items unrelated to those specified in the warrant. 65 F.3d at 358-59. Moreover, in *Buonocore*, the private party was present in a criminal investigative capacity, looking for evidence that would support its own private investigation for theft of its property by the plaintiff resident. *Id.* at 359 (plaintiff "alleged that law enforcement officers brought into his home a private person who was not assisting the officers in conducting a search but was on his own mission to recover property not mentioned in the warrant.").

Similarly, in *Bills v. Aseltine*, 958 F.2d 697, 704 (6th Cir. 1992) ("*Bills I*") the plaintiff claimed that state police officers violated the Fourth Amendment by inviting a General Motors security officer into the plaintiff's home "for the purpose of finding General Motors property, thereby discovering evidence that might be of some use in a prosecution unrelated to that involving" the property identified in the search warrant. *Id.* at 704. The district court granted summary judgment to the police officers. The Sixth Circuit reversed, concluding that genuine issues of material fact existed as to whether under these circumstance the search was unreasonable and thus violated the Fourth Amendment. *Id.* at 705.

Based on the undisputed and established facts of this case, it simply cannot be said that the decision below conflicts with the holdings of *Buonocore* and *Bills I* and *II*, which confronted facts wholly distinct from those at issue herein. As an initial matter, neither *Bills* (*I* and *II*) nor *Buonocore* involved simultaneous media coverage of an otherwise reasonable search and thus are distinguishable on this basis alone. Moreover, Respondents Dell, Boyer and Risk, in further contrast to the law enforcement officers in *Bills* and *Buonocore*, did not affirmatively "invite" or "bring" KSDK into Petitioners' residence. Additionally, the KSDK news crew, unlike the private individuals in those cases, neither participated in the search nor engaged in an independent search of Petitioners' residence for items unrelated to those described in the search warrant. And, perhaps most important, unlike the corporate security officers in *Bills* and *Buonocore*, KSDK was not present in

Petitioners' residence searching for its corporate property in furtherance of its own criminal investigative purposes, but rather was simply observing the City Police Officers' search for items specifically enumerated in the warrant in furtherance of KSDK's own newsgathering purposes.

Contrary to Petitioners' assertions herein, *Bills* and *Buonocore* do not turn on whether the government wrongfully allowed thirdpersons to observe an otherwise reasonable search,[10] but rather on whether the government had evaded the constraints of the Fourth Amendment, or invited its circumvention, by conducting or encouraging judicially unauthorized suspicionless and unparticularized searches through or by third persons in furtherance of either their own or a private criminal investigation. *See Parker*, 905 F.Supp. at 642-43 ("The facts in this case are ... easily distinguished from cases in which ... a corporate security guard was invited to accompany the police in executing a search warrant in a home in furtherance of the corporation's own investigation of the ... alleged thefts ....") (*citing Bills II*). Accordingly, there is no fully developed appellate conflict that avoids the *Mendoza* rule and justifies granting *certiorari* in this case.

Nor does the Court of Appeals' determination that "we [do not] think it self-evident that the police offend fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant," 93 F.3d at 447, squarely conflict, as Petitioners contend, with the Fourth Amendment jurisprudence of this Court. This Court has never suggested, let alone squarely held, that such police conduct violates the Fourth Amendment. To the contrary, this Court implicitly has rejected Petitioners attempt to constitutionalize via the Fourth Amendment what at most is a state law tort claim for invasion of privacy against Respondent police officers and KSDK. *Katz v. United States*, 389 U.S. 347, 350 and n. 6 (1967) ("the protection of a person's general right to privacy — his right to be let alone by other people — is ... left largely to the law

---

[10] Indeed, such passive observation has been held not to offend the Fourth Amendment. *United States v. McKeever*, 906 F.2d 129, 132 (5th Cir. 1990), *cert. denied*, 498 U.S. 1070 (1991) (Fourth Amendment not violated where magistrate judge observed but did not participate in the search).

of the individual States."); *Soldal v. Cook County*, 506 U.S. 56 (1992) ("the Fourth Amendment can neither be translated into a provision dealing with constitutionally protected areas nor into a general constitutional right to privacy") (*citing Katz*, 389 U.S. at 350). *Cf. Collins v. Harker Heights*, ___ U.S. ___, 112 S.Ct 1061 (1992) ("Because the Due Process Clause does not purport to supplant traditional tort law in laying down rules of conduct to regulate liabilities for injuries that attend living together in society we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.") (quotations and citations omitted).

The issue presented herein has never been squarely addressed by this Court and has been addressed by at most only two courts of appeals. If ultimately reviewable by this Court at all, it first should be allowed to percolate in the federal courts of appeals until such time, if ever, as it is jurisprudentially mature and ripe for this Court's review. For this reason alone, Petitioners' Petition should be denied. *See Mendoza*, 464 U.S. at 160.

II. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY WITHOUT FIRST DETERMINING WHETHER THE CONSTITUTIONAL RIGHT PETITIONERS SOUGHT TO VINDICATE IN FACT EXISTS, WHEN DECIDING THIS CASE ON THAT BASIS AVOIDED NEEDLESSLY REACHING AND RESOLVING A COMPLEX CONSTITUTIONAL QUESTION?

Petitioners argue that the Court of Appeals erred when it decided that the police officers were entitled to qualified immunity without first determining whether the constitutional right claimed by Petitioners in fact existed.

It is axiomatic, however, that courts should avoid reaching constitutional questions when a case can be decided on non-constitutional grounds. *U.S. v. National Treasury Employers Union*, ____ U.S. ____, 115 S.Ct. 1003, 1019 (1995) (Court has "policy of avoiding unnecessary adjudication of constitutional issues.") (*citing Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936); *Taylor v. Peabody Coal Co.*, 892

F.2d 503, 508 (7th Cir. 1990) ("In general, courts will not consider constitutional arguments where a case may be disposed of on alternate, non-constitutional grounds.").

Nothing in *Siegert v. Gilley*, 500 U.S. 226 (1991) alters this prudential rule of decision. Indeed, contrary to Petitioners' suggestion, *Siegert* does not state that courts of appeals *must always* as an initial inquiry address whether a constitutional violation has been alleged by the plaintiff." *Acierno v. Cloutier*, 40 F.3d 597, 606 n.7 (3d Cir. 1994). This Court's decision in *Siegert*, when read as a whole, permits appellate courts to decide cases "on the ground that appear[s] to offer the most direct and appropriate resolution." *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring in the judgment).

The Court of Appeals properly followed this decisional rule when it avoided resolving the complex underlying constitutional issue of whether the law enforcement officers violated the Fourth Amendment and instead decided the case on a narrower, non-constitutional basis; *i.e.*, that the police officers were entitled to qualified immunity because the constitutional principle Petitioners sought to vindicate, regardless of its ultimate viability, was not well-established at the time the police officers allegedly violated it. 93 F.3d at 447. Because the Eighth Circuit's decision properly proceeds from and conforms to this prudential rule, a review of that decision by this Court is unwarranted.

III. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT KSDK WAS NOT A STATE ACTOR FOR PURPOSES OF 42 U.S.C. § 1983, WHEN, ACTING ON ITS OWN INITIATIVE AND SOLELY FOR NEWS-GATHERING PURPOSES, KSDK'S NEWS CREW ENTERED A PRIVATE RESIDENCE TO OBSERVE AND FILM A SEARCH BY LOCAL LAW ENFORCEMENT OFFICIALS THEREIN, WITHOUT PARTICIPATING IN, AIDING OR ORCHESTRATING THE SEARCH, AND WITHOUT PRIOR AUTHORIZATION, DIRECT ASSISTANCE OR EXPRESS PERMISSION FROM THE LAW ENFORCEMENT OFFICIALS CONDUCTING THE SEARCH?

Petitioners' petition for writ of *certiorari* as to the state action issue should be denied for three independent reasons. First, there is no conflict among the federal courts of appeals, or between the decision

below and the decisions of this Court, to justify granting the instant Petition. Second, the decision below turns on application of the well-established § 1983 state action test enunciated in *Lugar v. Edmondson Oil* to the undisputed facts of this case. As such, the decision below provides little precedential value regarding the state action issue. Third, the decision below was correct, in that it is amply supported by this Court's jurisprudence and the uncontroverted record evidence.

A. There Is No Conflict Among the Circuit Courts of Appeals, Or Between The Decision Below and Those of This Court, to Support Petitioners' Petition.

The Court of Appeals in the decision below is the only federal appellate court to confront squarely the issue of whether a private news organization is a state actor for purposes of 42 U.S.C. § 1983 when, acting of its own volition, it is present during the execution of a search warrant by local law enforcement officials merely to observe and gather news about that police activity. For this reason alone, the Petition should be denied. *See United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (grant of *certiorari* warranted where courts of appeals decisions "squarely conflicted."); *Mendoza, supra* (several courts of appeals should explore a difficult issue before *certiorari* is granted).

Moreover, the Court of Appeals' decision below is entirely consistent with those of other courts that have explored similar issues and held or suggested that the private person who either participated in or observed the search was not a state actor subject to the constraints of the Fourth Amendment. *See, e.g., Bills v. Aseltine*, 958 F.2d 697, 703 (6th Cir. 1992) ("*Bills I*") (private corporate security officer "obviously had no warrant of his own, and his intrusion was separate and distinct from the police entry because he entered the premises for purposes other than the execution of the search warrant."); *see also, United States v. Sanchez*, 509 F.2d 886, 889 (6th Cir. 1975) (warrantless entry into and search of home by federal ATF agent, while accompanying state police officers who were searching the home pursuant to a search warrant for a different purpose, is a "simultaneous but distinct" intrusion); *Bills II*, 52 F.3d at 606 (reaffirming that the

private security officer "is not a state actor and thus cannot violate the Fourth Amendment."); *Mullins v. Bookman*, 23 Med.L.Rptr. 2374 (D. Ga. 1995) (holding no § 1983 state action under joint participation test when prison officials allowed media defendants to enter prison and escorted them around the facility but "were not involved in the *production*, editing or content of the broadcast at issue") (emphasis supplied);[11] *Jones v. Taibbi*, 508 F.Supp. 1069, 1072-74, n. 6 and n. 10 (D. Mass.), *cert. denied*, 454 U.S. 1085 (1981) (noting generally that "attempts to charge the media with state action have generally met with a cool reception in the courts" and holding that television news reporter not a state actor where he did not control police decision to arrest the plaintiff and police were not involved in his decision to cover or telecast the story); *Prahl v. Brosamle*, 98 Wis.2d 130, 295 N.W.2d 768 (Ct. App. 1980) (reporter, who learned of search via police scanner, and given permission by police to film the search of plaintiff's home, was not a state actor because he was acting exclusively for his private employer, filming on his own initiative and playing no official role in raid). *Cf.*, *Berger v. CNN Inc.*, 24 Med.L.Rptr. 1757, 1759 (D. Mont. 1996) ("acting under color of law" requirement for *Bivens* action not fulfilled where members of news media are present at search in furtherance of their own newsgathering purposes).

Nor is there a direct and apparent conflict between the decisions below and those of this Court. No prior decision of this Court has squarely confronted whether and under what circumstances the private news media can be a state actor for purposes of § 1983, let alone found state action on even remotely similar facts. Nor can Petitioners point to any state action decision of this Court that, on its precise holding, is squarely at odds with the decisions below. To the contrary, and as will be demonstrated below, this Court's decisions amply support that of the Court of Appeals.

The Petition fails for yet another reason. In determining that, on the undisputed evidence, Petitioners could not establish that KSDK was a state actor under this Court's decision in *Lugar*, the decisions below

[11] This unpublished decision together with all other unpublished Media Law Reporter decisions cited herein properly were relied on below pursuant to Local Rule 28A(k) of the Eighth Circuit Court of Appeals, in that they have persuasive value on material issues for which there is little or no precedential case law.

each applied findings of undisputed fact to the well-established precedent of this Court. Because the Petition seeks to challenge these factbound applications of previously settled law, *certiorari* is unwarranted. In reality, Petitioners quarrel more with the lower courts' findings of undisputed fact than with the conclusions of law drawn therefrom. That Petitioners primarily take issue with the lower courts' findings of fact is evidenced by those instances in their Petition, as noted above in KSDK's Statement of the Case, where Petitioners' alleged and unsupported facts are directly at odds with the factual findings of the courts below. In such circumstances, review by this Court is unwarranted, particularly when, as here, the findings of fact made by the district court received the concurrence of the Court of Appeals.[12] *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a *certiorari* to review evidence and discuss specific facts."); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court of correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

B. The District Court Properly Granted Summary Judgment in KSDK's Favor as to Petitioners' Claims under 42 U.S.C. § 1983, And the Court of Appeals Correctly Affirmed That Ruling, Because KSDK's Conduct at Issue in this Case Does Not Constitute State Action under *Lugar v. Edmondson Oil Co.*

The Court of Appeals correctly affirmed the District Court's grant of summary judgment in favor of KSDK and against Petitioners on their § 1983 claim, on the grounds that KSDK was not acting under color of law when it entered Petitioners' residence and filmed the execution of a valid search warrant therein by the SLPD. Petitioners now wish this Court to review and overturn these rulings. The decisions below, however, are correct and amply supported by this Court's jurisprudence and the uncontroverted facts as determined by

---

[12] The Court of Appeals adopted and concurred in the District Court's findings of undisputed fact. *See Parker*, 93 F.3d at 448.

the District Court and adopted by the Court of Appeals. Accordingly, these decisions should not be reviewed, let alone overturned, by this Court.

It is axiomatic that to pursue a claim under 42 U.S.C. §1983 against KSDK, Petitioners necessarily must show that KSDK acted under "color of state law." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). Section 1983's statutory requirement of action "under color of state law," has been construed as identical to the "state action" requirement of the Fourteenth Amendment. *Lugar*, 457 U.S. at 928-29. There are two components to the § 1983 "state action" requirement: (1) the deprivation must be shown to have been caused by the exercise of some right or privilege created by the state, or by a person for whom the state is responsible; and (2), the party charged with the deprivation must be someone who can fairly be said to be a state actor." *Lugar*, 457 U.S. at 497.

This Court counsels that a private person such as KSDK[13] should be held to be a state actor only reluctantly:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is a good or bad policy, it is a fundamental fact of our political order.

Lugar, 457 U.S. at 936-37.

This reluctance is even more pronounced when the plaintiff attempts to prove state action by linking acts of state officials to "private conduct that itself is the subject of constitutional protection." *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989). *Cf. Zerilli v. Evening News Ass'n.*, 628 F.2d 217 (D.C. Cir. 1980) (affirming dismissal of Fourth Amendment based *Bivens* action against private newspaper in view of "special factors counseling hesitation" including concern that imposing liability on a newspaper "for uncov-

---

[13] It is undisputed that KSDK is a private entity.

ering and publishing information that it deem[ed] newsworthy" would undermine "the values served by a free and vigilant press"). This is precisely the case here, in that KSDK's newsgathering and its editorial decision to follow the SLPD into Plaintiffs' residence to film and broadcast the search are acts implicating the First Amendment.

Because the state action inquiry is so fact specific, the holdings below provide only narrow precedential value. For this reason alone, this Court should deny the instant petition. Moreover, measuring the undisputed facts as determined below against this stringent state action standard compels the conclusion that neither of *Lugar's* state action components is satisfied in this case.

1. KSDK Was Not Exercising a Right or Privilege Created by the State When It Entered the Parker Residence and Filmed the Search.

The courts below properly held that Petitioners did not satisfy the first prong of the *Lugar* test, which required them to show that the alleged deprivation was caused by the exercise of some right or privilege created by the state, because, "at most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant. *Parker*, 905 F.Supp. at 642; 93 F.3d at 448.

Nonetheless, Petitioners opine that the District Court and the Court of Appeals misapplied the first prong of the *Lugar* test. While their theory in this regard is not altogether clear, and mistakenly melds the first and second prongs of the *Lugar* test, Petitioners appear to be contending that KSDK somehow vicariously exercised the state-created privilege of the SLPD to enter and search the home pursuant to the search warrant.[14] The gist of this argument seems to be based on the erroneous premise that the basis for KSDK's entry is the same as the basis for the SLPD's entry, *i.e.*, the search warrant. (*See* Petition, p. 8.) This argument is fatally flawed for two reasons.

First, this argument has been either expressly or implicitly rejected by courts that have confronted similar situations when private persons

---

[14] Petitioners do not claim that the first prong is satisfied because KSDK is an entity for whom the state is responsible or that KSDK acted in accordance with a rule of conduct imposed by the state.

have accompanied law enforcement agents during a search of a private residence. For example, the Sixth Circuit Court of Appeals in *Bills I* stated that the private security officer who accompanied police "obviously had no warrant of his own, and his intrusion was separate and distinct from the police entry because he entered the premises for purposes other than the execution of the search warrant." 958 F.2d at 703. Based on these facts, the Sixth Circuit rejected in *dictum* the notion that the security guard could be held liable for violating the Fourth Amendment in such circumstances:

> It is also important to bear in mind that the rights afforded by the Fourth and Fourteenth Amendments protect citizens only against governmental action. As the Supreme Court stated in *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921), the Fourth Amendment 'was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies ....' Thus, [the security guard's] inspection tour and photographing of items in plaintiff's home, by itself, while perhaps constituting a trespass, does not offend the Fourth Amendment. *Id.* at 703-04.

See also, *Bills II*, 52 F.3d at 606 (reaffirming that the private security officer "is not a state actor and thus cannot violate the Fourth Amendment."); *Sanchez*, 509 F.2d at 889 (entry authorized by warrant and warrantless entry are simultaneous but separate intrusions).

Similar to the corporate security officer in *Bills I*, KSDK was not named in the search warrant authorizing the police to be in Petitioners' house, had no search warrant of its own and entered the premises for purposes other than the execution of the search warrant. It is undisputed, moreover, that KSDK did not seek permission from the SLPD to enter the residence and the SLPD did not invite KSDK to enter the residence. Rather, the KSDK news crew followed their journalistic instincts and entered the Parker residence to gather news about the MRU's weapons suppression program. Thus, KSDK did not enter the residence pursuant to the search warrant and its entry into the Parker residence was separate and distinct from the SLPD entry. From this it necessarily follows that KSDK's entry into the Parker residence during and videotaping of the search, by itself, is similarly not state

action subject to the constraints of the Fourth and Fourteenth Amendments and § 1983.

The second flaw in Petitioners' argument is that it threatens to obliterate the distinction between state and private conduct. With this state action theory, Petitioners apparently contend that the media stand in the shoes of law enforcement and thus vicariously exercise executive powers solely by virtue of their simultaneous coverage of law enforcement activity. To accept such an argument would be to convert all simultaneous media coverage of law enforcement activity into state action. Creating such ill-conceived precedent would place the media at risk of sharing liability for any unlawful law enforcement activity they have the misfortune to cover and consequently discourage first-hand coverage of law enforcement and other governmental activity. Such a nonsensical result not only would thwart the media's performance of its constitutional role as the watchdog of governmental conduct, but also runs contrary to the Court's admonition in *Lugar* against too facile an extension of § 1983 liability to private parties.

Despite their assertions to the contrary, Petitioners' argument that they satisfied the first prong is precluded by this Court's holding in *Lugar*. In *Lugar*, the Court held that allegations of private misuse of a state statute or legal procedures do not satisfy the first prong of the state action analysis. Here Petitioners have argued that the Respondent police officers exceeded the scope of the warrant and violated the Fourth Amendment by permitting KSDK to be present during the search without the warrant authorizing KSDK to be there. Because it alleges that the Respondent police officers and KSDK misused the search warrant that did not authorize KSDK's presence in their residence, Petitioners' § 1983 claim, like the first claim at issue in *Lugar*, fails the first prong of the state action analysis.

Ultimately, Petitioners simply cannot point to any right or privilege created by the state that KSDK exercised to enter their residence and film the search to support their § 1983 claims against KSDK. Therefore, Petitioners cannot satisfy the first prong of *Lugar*. For this reason alone, the District Court and Court of Appeals correctly held that Plaintiffs' § 1983 claim against KSDK fails as a matter of law.

2. KSDK Cannot Fairly Be Said To Be a State Actor.

Although the District Court held that Petitioners had not satisfied the second prong of *Lugar*, which requires that a private party must fairly be said to be a state actor before subjecting it to the strictures § 1983, the Court of Appeals, which based its decision solely on *Lugar's* first prong, never reviewed that particular issue. Because the Court of Appeals did not address the second prong of the *Lugar* test, review of that prong would be premature and unnecesary. *Mendoza*, 464 U.S. at 160.

In any event, the District Court properly held that Petitioners did not satisfy *Lugar's* second prong. In *Lugar*, the Court held that the second prong was satisfied under the joint participation test where, on the *ex parte* application of one party to a private dispute, a writ of attachment is issued by a state court clerk and executed by a local sheriff. The Court limited this holding to cases of prejudgment attachment. *See* 457 U.S. at 939 ("the Court has articulated a number of different factors or tests in different contexts; e.g., ... in the case of prejudgment attachments, a 'joint action' test"; consequently, [t]he holding today ... is limited to the particular context of prejudgment attachment."). Accordingly, in situations like here that do not involve prejudgment attachment, *Lugar* does not particularly apply.

Petitioners hinge their contention that KSDK was a state actor on three theories: 1) joint participation; 2) symbiotic relationship; and 3) nexus. Each of these theories is unavailing and finds no support in the undisputed facts of this case.[15]

a. The Undisputed Facts Do Not Support a Finding of State Action Under the Joint Participation Test.

Petitioners contend that KSDK's conduct satisfies the "joint participation" test. The focus of this test is whether the private party acted as a "willful participant in joint action with the state or its agents." *Parker*, 905 F.Supp. at 642 (*citing United States v. Price*, 383 U.S. 787,

---

[15] This Court's recent jurisprudence indicates that the joint participation, symbiotic relationship and nexus theories are factors to be considered in determining whether a private party can fairly be said to be a state actor under *Lugar*'s second prong. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991).

794 (1966)). *Accord Mershon v. Beasley*, 994 F.2d 449 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1055 (1994). Applying this "joint action" test, the Eighth Circuit has held, consistent with other courts of appeals, that, to survive a motion for summary judgment, a plaintiff seeking to hold a private party liable under § 1983 must adduce evidence from which reasonable jurors could conclude that there was a mutual understanding, or a meeting of the minds, between the private party and the state actor as to an unconstitutional goal or purpose. *Mershon*, 994 F.2d at 451; *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 558 (8th Cir. 1989).

Petitioners nonetheless maintain that they need not prove a conspiracy between the state and private actors to satisfy the "joint participation" test "because the Court in *Lugar* did not require that a private party's action rise to the level of a conspiracy to constitute state action." *See* Petition at 16. While this may be true under *Lugar* in the context of prejudgment attachment, the same cannot be said of cases, such as this, that fall outside that particular context. *Lugar*, 457 U.S. at 940 n. 21 ("The holding today ... is limited to the particular context of prejudgment attachment."). In cases such as this that do not involve prejudgment attachment, the precise contours of the joint participation test are delineated by *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), as subsequently refined by the decisions of this Court. In *Adickes*, the Court "held that the private party's joint participation with a state official *in a conspiracy* to discriminate would constitute ... action 'under color' of law for purposes of [§ 1983]." *Lugar*, 457 U.S. at 931 (emphasis supplied) (*citing*, *Adickes*, 398 U.S. at 152; *see also United States v. Price*, 383 U.S. 787, 795 (1966) (under color of law requirement satisfied where it was alleged that private parties acted in "willful concert with state officers."). Accordingly, the Court of Appeals' articulation below of the joint participation test as requiring "a mutual understanding or meeting of the minds" is wholly consistent with the decisions of this Court.

This undisputed evidence precludes a finding that KSDK and the SLPD possessed a mutual understanding that KSDK would enter Petitioners' residence to film the search. Petitioners' joint participation argument hinges entirely on their assertion that KSDK and Respondents Boyer, Dell and Risk "jointly agreed for KSDK's news

crew to be present and to enter Petitioners' home under the guise of the search warrant." *See* Petition at 17. The undisputed facts as determined by the District Court, however, refute this assertion. Indeed, the District Court below expressly found that there was no meeting of the minds between KSDK and the SLPD. 905 F.Supp. at 642 (no "affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which Plaintiffs now challenge"). KSDK did not seek or obtain permission from the SLPD to enter Petitioners' residence. Rather, the KSDK news crew made a unilateral decision to enter the Parker residence for the sole purpose of publishing a story about such searches on KSDK's newscast. The SLPD, on the other hand, entered the Parker residence for the sole purpose of executing a valid search warrant. The District Court thus correctly concluded that Petitioners did not satisfy the joint action test because the SLPD and the KSDK news crew entered the Parker home for disparate purposes and while there performed the entirely and immutably separate functions of press and police, respectively. 905 F.Supp. at 642-43. *See also Polk County v. Dodson*, 454 U.S. 312 (1981) (holding that despite employment by government, a public defender, in serving the interests of a private criminal defendant is not a state actor); *Prahl v. Bosamle*, 295 N.W.2d at 774.

The undisputed facts also reveal that the SLPD did not instruct KSDK to film the search, where to go, what to do, who to film or whether even to broadcast a story about the search. *See Mullins v. Bookman*, 23 Med.L.Rptr. 2374 (D. Ga. 1995) (holding no § 1983 state action under joint participation test when prison officials allowed media defendants to enter prison and escorted them around the facility but "were not involved in the *production*, editing or content of the broadcast at issue") (emphasis supplied); *Price v. Baker*, 693 F. 2d 952, 953-54 (10th Cir. 1982) (private actor not liable under § 1983 where police did not direct her actions but instead plaintiff acted independently and of her own volition); *Jones v. Taibbi*, 508 F.Supp. at 1072-73, n. 10 (television news reporter not a state actor where he did not control police decision to arrest the plaintiff and police were not involved in his decision to cover or telecast the story).

Similarly, the SLPD obtained, reached the decision to execute, and executed the search warrant at issue in this case without any input

whatsoever from KSDK. Indeed, the undisputed record evidence reveals, contrary to Petitioners' unsupported assertion, that KSDK did not even know a search was to be executed at a private residence before its news crew arrived there. At no time prior to KSDK's entry of Petitioners' residence did the SLPD and KSDK plan or anticipate that KSDK would enter or film inside residences. Moreover, KSDK neither orchestrated nor assisted the actions of the SLPD. Rather, the KSDK news crew merely made the unilateral decision to follow and record the SLPD as police searched the premises. From these undisputed facts it necessarily follows that KSDK and the SLPD did not act according to a preconceived plan or conspiracy. Thus, KSDK was not engaged in joint action with the SLPD.

Petitioners' attempt to establish a preconceived plan and conspiracy for the KSDK's news crew to be present in and to enter their residence based on the mere fact that the KSDK news crew happened to be riding along with the police on the night of the search. This is insufficient as a matter of law because it is based on mere conjecture and speculation. The fact that the SLPD agreed to allow the KSDK news crew to ride along that evening does not evince a meeting of the minds between the SLPD and KSDK as to what KSDK would see or do, or report or film, during the ride-along. This is precisely the type of tenuous connection which the Eighth Circuit previously has rejected as a basis for § 1983 liability against a private entity. *See, e.g., Mershon v. Beasley*, 994 F.2d at 452 (inference of a mutual understanding cannot be the result of mere conjecture and speculation).

Petitioners also claim that KSDK's conduct constitutes state action because its newsgathering somehow was facilitated by the SLPD confining the occupants of the Parker residence to one room during the search. However, Petitioners cannot point to a single undisputed fact that supports their conclusion that the SLPD confined the occupants to one room for any reason other than as a routine measure to secure the premises during the search. There is absolutely no record evidence that the SLPD restricted the residents in an effort to facilitate KSDK's newsgathering activities. Nor is there any evidence that this action by the SLPD actually did facilitate KSDK's newsgathering efforts. In any event, if state action can be based on such a routine law enforcement practice which, at most, unintentionally and only incidentally would

serve to facilitate media coverage of police activity, the news media would find themselves inundated with constitutional litigation as a result of gathering news about law enforcement operations.

There are absolutely no facts in the undisputed record evidence of this case from which a reasonable juror can conclude that there was a mutual understanding, or a meeting of the minds, between KSDK and the SLPD. Accordingly, Petitioners cannot establish state action under the joint participation test.[16]

b. The Undisputed Facts Do Not Support a Finding of State Action Under Either the Symbiotic Relationship Theory Or the Nexus Theory.

The undisputed facts likewise do not support Petitioners' symbiotic relationship and nexus theories of state action. Under the symbiotic relationship theory, state action is present if the state "has so far insinuated itself into a position of interdependence" with a private party that "it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). Here, not one undisputed fact even remotely suggests that the SLPD and KSDK share such a relationship.

Nevertheless, Petitioners contend that the facts of this case fall within the ambit of *Burton*, theorizing that the SLPD and KSDK mutually benefitted from KSDK's broadcast about the weapons suppression program. Specifically, Petitioners would have this Court predicate a finding of state action solely on the unsupported, conclusory assertions that the SLPD received somewhat favorable media coverage and KSDK obtained a good story for its news program and

[16] In an effort to avoid their heavy burden on the state action requirement, Petitioners cite *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 655 (7th Cir. en banc 1972), *cert. denied*, 409 U.S. 1114 (1973). That decision, however, is unavailing for two related reasons. First, it predates *Lugar* and thus was not applying the state action analysis articulated there. Second, to the extent that Seventh Circuit decision can be read as standing for the proposition, divorced from its precise holding, that state action is established where the private party "derives *some* 'aid, comfort, or incentive,' either real or apparent, from the state," *id.* at 655 (*citing, Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (Brennan J., concurring) (emphasis supplied), it is implicitly overruled by *Lugar*, which requires "*significant*" state aid before private action becomes that of the state. 457 U.S. at 937.

allegedly realized a corporate profit as a result. Even if Petitioners had produced evidence of such a benefit, this simply is not the type of ongoing mutual benefit found to exist in *Burton* in which there existed an overwhelming degree of financial integration and interdependence not present here. 365 U.S. at 51.

The undisputed facts likewise do not support Petitioners' theory that KSDK was a state actor under the "nexus" theory. Under this theory, private conduct can constitute state action when the state has coerced or has so significantly encouraged the decision to engage in such conduct that the conduct must "in law be deemed to be that of the state." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). In this case, no undisputed facts support a finding that the SLPD coerced or so significantly encouraged KSDK's decision to enter the Parker residence and film the search so as to transform KSDK's conduct into state action. Indeed, the District Court found that KSDK's act of entering Petitioners' residence and filming the search proceeded from the KSDK news crew's independent exercise of its journalistic judgment and decision to cover and report on a newsworthy event.

Finally, Petitioners seem to imply that KSDK should be found to be a state actor because the SLPD acquiesced to KSDK's presence at Petitioners' residence during the search. Such a theory is unavailing. It is well-established that the state's "mere acquiescence in a private action does not convert that action into that of the State." *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978); *Rendell-Baker v. Kohn*, 457 U.S. 830, 1004-05 (1982).[17]

[17] Petitioners' suggestion that KSDK's mere participation in a ride-along with the City Police Officers is alone sufficient to support a finding of state action not only fails to satisfy this Court's state action standards, but also offends the First Amendment. If accepted, this state action theory, by which the Parkers attempt to subject KSDK's newsgathering to § 1983 liability, is impermissibly chilling and overbroad because it sweeps the lawful newsgathering activity of participating in ride-alongs within the ambit of potentially unconstitutional conduct. In so doing, it restricts the media's right to gather news and deprives the public of information about law enforcement operations. Without such information, the public's ability to exercise its First Amendment right to free and informed public discourse about issues of public concern would be significantly curtailed. At a very minimum, the impact of holding that the media is subject to the constraints of the Fourth Amendment when it simultaneously

(Footnote 18 continued on next page)

In the final analysis, none of Petitioners' state action theories — joint participation, symbiotic relationship or nexus — finds any support in the undisputed facts as determined below. Because KSDK cannot fairly be said to be a state actor, Petitioners cannot satisfy the second prong of the *Lugar* test. Accordingly, Petitioners' § 1983 claim is precluded as a matter of law and the decisions below granting summary judgment in favor of KSDK were proper.

Moreover, even if § 1983 and the Fourth Amendment could be stretched to extend to such situations, imposing liability on KSDK based on the facts herein would be erroneous as a matter of law for two additional and alternative reasons. First, assuming *arguendo* that the actions of the KSDK news crew had been found to be state action, § 1983 liability still could not be imposed on KSDK because the record evidence establishes conclusively that the KSDK news crew at all times was acting in good faith and did not act with a "subjective appreciation that its acts" would deprive Petitioners of the constitutional right to be free from unreasonable searches. *See, e.g., Jordan v. Fox Rothschild O'Brien & Frankel*, 20 F.3d 1250, 1276-77 (3rd Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir.), *cert. denied*, 510 U.S. 977 (1993); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692 (6th Cir. 1996) (private defendants in a § 1983 action are entitled to an affirmative defense of good faith). KSDK's good faith acts as a complete bar to Petitioners' claims herein.

Finally, Petitioners' state action theories against KSDK necessarily fail because they are nothing more than an attempt to transmute what are, if anything, state tort claims to constitutional dimension. Such attempt is unavailing because KSDK's routine newsgathering activity at issue below was authorized under Missouri state law pursuant to the

---

(Footnote 17 continued)

observes a search by law enforcement officials in a private residence should be explored by the lower courts before this Court reviews that issue. *Cf. Allen v. Combined Communications*, 7 Med.L.Rptr. 2417, 2418-2420 (D. Colo. 1981)(state's interest in undisturbed possession of private property as expressed in state trespass law must be balanced against media's First Amendment right to gather news).

common law doctrine of implied consent.[18] As such, KSDK's allegedly unconstitutional conduct was non-tortious and absolutely privileged under the First Amendment to the United States Constitution. *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989) (First Amendment insulates non-tortious newsgathering from liability).

CONCLUSION

For the foregoing reasons, authorities and equities, Respondent Multimedia KSDK, Inc. respectfully requests that the Court deny the Petition of Sandra C. Parker and Dana M. Parker seeking a writ of *certiorari* granting review of the judgment below of the United States Court of Appeals for the Eighth Circuit in this cause.

Respectfully submitted,

Mary Ann L. Wymore*
Gerald R. Ortbals
John E. Petite
Greensfelder, Hemker & Gale, P.C.
2000 Equitable Building
10 South Broadway
St. Louis, Missouri 63102-1774
(314) 241-9090

Counsel for Respondents

*Counsel of Record

---

[18] That the District Court dismissed Petitioners' pendent state law claims for invasion of privacy without either addressing the merits of those claims or considering KSDK's defenses thereto, raises the troubling possibility that, should this Court review Petitioners' federal claim and subject KSDK to § 1983 liability, Respondents could be found to have violated the Fourth Amendment and § 1983 even though KSDK may have been authorized to be present in the Parker residence under state law pursuant to a theory of implied consent. *See Boling Concrete Constr. Co. v. Townsend*, 686 S.W.2d 842, 843 (Mo. Ct. App. 1985) ("[o]ne who silently watches another enter upon the former's land and then willingly engages the latter in conversation while standing upon the premises may not later be heard to complain of trespass").